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标准必要专利权滥用的私法规范机制研究

Research on Private Law System
Regulating Abuse of Standard Essential Patents

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内容摘要

反垄断法不足以对标准必要专利权滥用行为形成有效规制：技术市场本就具有的超强自我调整能力，使得以效率垄断性和动态竞争性为显著特征的标准必要专利权滥用行为对市场竞争秩序所造成的损害尚未达到“市场失灵”的程度，也大多能够通过私法自身的权利限制机制得以有效规制；不确定性的反垄断法对该领域的外部干预不足以为市场提供稳定的行为预期，因而应首先尊重作为行业自治规范的标准化组织专利政策的技术优势和市场经验优势，并在体系化的私法规则之后居于补充适用的地位；且其规制模式应当从个案地适用抽象的反垄断法规则向制定具体的反垄断法实施细则或实施指南进行转变。技术标准的公益性和公开性使其具有了私法意义上的权利公示和信息公示功能，这使得标准必要专利权滥用的私法规则之治得以形成：一方面，物权法和合同法等财产法规则可以借助技术标准的权利公示平台逻辑地推论适用于技术标准领域，从而赋予标准必要专利 FRAND 许可使用权以“用益专利权”的法律属性，实现了其从相对性债权向对世性绝对权的转变；也使得标准实施人的投资信赖并非仅仅来源于特定专利权人的 FRAND 承诺本身，而是来源于技术标准整体，进而获得更为稳定的法律预期；另一方面，技术标准的信息公示平台属性不仅使得透明的、公开的 FRAND 许可市场得以形成，进而实现市场化的 FRAND 许可费形成机制；也使得 FRAND 许可原则具有了在技术标准领域得以补充性和推定性适用的“兜底”条款属性，并借助与事前披露许可条款原则的融合实现标准化组织专利政策的最合理选择。

本论文的主体部分分为四章：

第一章从技术标准契约、降低交易费用、促进技术创新、反垄断法责任豁免这四个层面论述了标准化组织及其技术标准的正当性，从而一方面为后文的论述奠定了理论基础，另一方面指出了技术标准领域的核心问题在于如何有效规制标准必要专利权滥用行为。

第二章以知识产权法自身以及私法体系已经具有相应的权利限制机制为理论基础，重点论述了反垄断法对于规制标准专利权滥用行为应处于补充适用地

位，反垄断执法机构对于标准必要专利权滥用行为的规制模式应当进行转变：从主动适用抽象的反垄断法规则到制定相对完善的反垄断法实施细则或实施指南，并充分尊重标准化组织知识产权政策的行业自治规范效力。

第三章以“FRAND 承诺是否随标准必要专利权的让与而移转”这一问题为切入点，重点论述了体系化的私法逻辑方法对于规制标准专利权滥用行为的必要性和可行性；在论述技术标准应当具有的信息公示和权利公示属性基础上，论证了标准专利许可使用权的“用益专利权”属性，进而提出了 FRAND 许可费的市场化确定机制这一理论假设。

第四章论述了标准化组织以事前披露许可费原则对 FRAND 许可原则进行修正并融合的必要性和可行性，进而在“FRAND 义务的补充性、推定性法律规则属性”这一理论假设基础上，论述标准化组织知识产权政策应当优先于私法规则发挥其规制标准必要专利权滥用行为的作用。

关键词：标准必要专利权；反垄断法；私法规范；公平合理无歧视原则

ABSTRACT

Anti-Monopoly Law isn't sufficient to effectively regulate abuse of SEPs. Not only because SEPs' efficient monopoly and dynamic competition character make it impossible to badly damage the competition order of technology market to "market failure" degree, which has stronger self-adjusting ability, but also because the legal right restriction system of Private Law can effectively regulate most of these damages. Anti-Monopoly Law's external intervention to SEPs cannot provide the imperative stable behavior expectation because of its uncertainty. Therefore, Anti-Monopoly Law should firstly respect SSOs patent policy's advantage of technological and marketing experience, which being as industry self-regulating rules, and also in the supplementary application status following Private Law. Moreover, Anti-Monopoly Law should transfer its regulating mode from applying abstract rules case by case to formulating specific implementation or guideline. The Technology standard's characteristics of commonweal, openness and publicity provide it with legal right publicity and information publicity function in the sense of Private Law. This makes rule of Private Law for abuse of SEPs possible: On the one hand, the rules of Property Law such as Contract Law and Real Right Law can analogically apply to Technology Standards, by virtue of this right publicity platform. Accordingly, SEPs' FRAND license right can obtain the legal attribute of "Patent Usufruct", which is the transformation from relativity claim right to absolute imperium right. Moreover, The Standard implementer's investment trust thus is not only from SEPs FRAND commitment itself, but also from the overall Technology Standard, which providing more stable legal expectations. On the other hand, Technology Standards' information publicity platform makes the transparent and overt FRAND license market possible, and further realize the market-oriented FRAND royalty pricing mechanism. Accordingly, FRAND principle obtains the complementary and presumption clause attribute in the field of Technology Standards, and realizes the optimal choice of SSOs patent policy with integration of Ex-Ante Disclosure principle.

The thesis consists of four chapters besides of Introduction and Conclusion.

The first chapter discusses the legitimacy of SSOs and Technology Standards from four aspects: Technology Standards Contract, reducing transaction costs,

promoting technological innovation, and the exemption from Anti-Monopoly Law responsibility. Therefore, not only setting theoretical foundation for further discussion, but also showing the key issue of how to effectively regulate abuse of SEPs.

Based on the viewpoint of Intellectual Property Law and private law system have their own corresponding rights restriction mechanism, the second chapter demonstrates that Anti-Monopoly Law should be in the supplementary application status to regulate abuse of SEPs. And, the mode for Anti Monopoly Law enforcement agency regulating SEPs' abuse should carry out the transformation from applying abstract legal norms to formulating detailed implementation rules, and, respecting the self-regulating effect of SSOs Intellectual Property Policy.

The third chapter uses the question of "FRAND commitment whether should transfer with SEPs' assignment" as entry point, stressing on the necessity and feasibility of systematic private law logic method to regulate SEPs' abuse. Furthermore, based on demonstrating the public-summoning characteristic of Technology Standards, this chapter expounds the "Usufructuary Patent" attribute of patent licensing and discusses the theoretical hypothesis of market-oriented pricing mode of FRAND royalty.

Through the argument of SSOs relying on Ex-Ante Disclosure Principle to amend FRAND Principle and the integration of these two principles, the fourth chapter makes the hypothetical theoretical conclusion of "FRAND commitment's attribute of complementary and presumption legal rule" and carries on further verification: SSOs should regulate abuse of SEPs prior to private law.

Key Words: SEPs; Anti-Monopoly Law; Private Law; FRAND

缩略语表

缩略语	所代表的全称
标准专利权	标准必要专利权
AML	Anti-Monopoly Law, 反垄断法
AVS	Audio Video Coding Standard, 数字音视频解码技术标准
DOJ	Department of Justice, (美国) 司法部
EC	European Committee, 欧盟委员会
EU	European Union, 欧盟
FRAND	Fair Reasonable and Non-Discrimination 公平、合理、无歧视
FTC	Federal Trade Committee, (美国) 联邦贸易委员会
ICT	Information Communication Technology, 信息通信技术
IEEE	Institute of Electuical and Electuonics Engineers 美国电气及电子工程师学会
IEEE-SA	IEEE Standard Association, IEEE 标准协会
IETF	Internet Engineering Task Force, 互联网工程任务组
IP	Intellectual Property, 知识产权
RF	Royalty Free 无偿许可使用
SEPs	Standard Essential Patents, 标准必要专利权
SSOs	Standard Setting Organizations, 标准化组织
TS	Technology Standard, 技术标准

案例表

一、中文案例

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- [2]广东省高级人民法院（2013）粤高法民三终字第 305 号民事判决书。（华为技术有限公司与 IDC 公司标准必要专利使用费纠纷上诉案）
- [3]广东省高级人民法院（2013）粤高法民三终字第 306 号民事判决书。（华为技术有限公司与 IDC 公司滥用市场支配地位纠纷上诉案）
- [4]深圳市中级人民法院（2011）深中法知民初字第 857 号判决书。（华为技术有限公司与 IDC 公司标准必要专利使用费纠纷案）
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- [6]FTC v. Indiana Fed'n of Dentists, 476 U.S. 447,460-61(1986)
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[2007] 5 C.M.L.R. 11.

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[15]Research in Motion, Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 790 (N.D. Tex. 2008).

[16]United States v. Microsoft Corp., No.98-1232, 2002 WL 31654530 (D.D.C. Nov 12, 2002).

[17]Vizio, Inc. v. Funai Elec. Co. Ltd., No. CV 09-0174 AHM (RCx), 2010 WL 7762624 (C.D. Cal. Feb. 3, 2010).

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